Supreme Court, U. S.
FILED
FEB 21 1979
MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1162

PETER JORDAN, et al.,

Petitioners,

v.

UNIVERSITY OF TENNESSEE; BOARD OF REGENTS, STATE UNIVERSITY AND COMMUNITY COLLEGE SYSTEM, TENNESSEE; TENNESSEE HIGHER EDUCATION COMMISSION; RITA SANDERS GEIER, et al.; UNITED STATES OF AMERICA; RAYMOND RICHARDSON, JR., et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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On Petition For A Writ Of Certiorari To
The United States Court of Appeals
For The Sixth Circuit

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BRIEF IN OPPOSITION

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Raymond Richardson, Jr., et al., plaintiffs-intervenors below, respectfully request that the petition for a writ of certiorari to review the opinion of the Sixth Circuit be denied.

QUESTION PRESENTED

Whether denial of intervention pursuant to Rule 24(a) and (b), Fed. R. Civ. Pro., was an abuse of discretion?

STATEMENT OF THE CASE

This civil rights class action to desegregate the public higher education system in the State of Tennessee was filed by black students, faculty members and citizens in May 1968. Geier v. Blanton, 427 F.Supp. 644, 645 (M.D. Tenn. 1977). The United States and additional black students, faculty and administrators intervened in the action in 1968 and 1972 respectfully, and the action has been vigorously litigated since. 427 F.Supp. at 645-650. On January 31, 1977, the district court held, inter alia, that the dual system imposed by law remained undismantled, and that the traditionally black public higher education institution in Nashville, Tennessee (Tennessee State University) and a traditionally white public higher education institution in the same city (the University of Tennessee at Nashville) should be merged. 427 F.Supp. at 657-661. The

district court required that state defendants establish administrative procedures to develop an appropriate desegregation plan. 427 F.Supp. at 661-662.

Petitioners Peter Jordan, et al., white faculty members of the University of Tennessee at Nashville, sought intervention in order to present a plan of merger of the two institutions between the date of the district court's opinion of January 31, 1977, and the judgment of February 28, 1977. Intervention was denied as untimely and unnecessary. Pet. 15-17. The court of appeals affirmed. Pet. 13-14.

ARGUMENT

1. The two courts below did not abuse their discretion by declining to grant intervention. Petitioners' motion to intervene was filed 9 years after the action was originally filed, 5 years after state defendants were first ordered to consider the the feasibility of merger, several months after 30 days of trial on whether merger was an appropriate remedy, and only after the district court had already ordered defendants

to establish administrative procedures to develop a merger plan. See, 427 F.Supp. at 645-659. Intervention was clearly untimely under all the circumstances. NAACP v. New York, 413 U.S. 345, 364-366 (1973). In addition, both the district court and court of appeals expressly found intervention unnecessary in light of administrative procedures available to petitioners to advance their views on merger. Pet. 14, 16-17. Petitioners thus have suffered no prejudice.

2. The petition presents no significant or important questions requiring review. There simply is no conflict with any authority in light of the findings that delay was inexcusable and that alternative procedures for petitioners to express their interests are available. Pet 16-17.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A) is unreported. The order of the district court (Pet. App. B) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1978. The petition for a writ of certiorari was filed on January 25, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly concluded that the district court did not abuse its discretion in denying petitioners' motion to intervene in this case.

STATEMENT

1. This litigation began more than a decade ago when private plaintiffs, both black and white citizens of the State of Tennessee, sued to enjoin the proposed expansion of the University of Tennessee-Nashville Center (UT-N). See *Sanders* v. *Ellington,* 288 F. Supp. 937 (M.D. Tenn. 1968); *Geier* v. *Dunn,* 337 F. Supp. 573 (M.D. Tenn. 1972). The plaintiffs alleged that Tennessee Agricultural and Industrial State University, now Tennessee State University (TSU), was originally established as a public institution of higher education for blacks; that appropriations for TSU were not provided on a basis equal to those of the state's predominantly white institutions; that TSU was being maintained by State officials as a segregated black institution in violation of the Fourteenth Amendment; and that the proposed construction of new facilities at the predominantly white UT-N would ensure the continued existence of a dual system of public higher education in Tennessee by perpetuating the role of TSU as a segregated black institution. *Geier* v. *Blanton,* 427 F. Supp. 644, 645 (M.D. Tenn. 1977).

In 1968, the United States applied for and was granted leave to intervene as a party plaintiff in the action. The United States joined the plaintiffs in many of their substantive allegations and requested, in addition to the relief plaintiffs had sought, that State officials be required to formulate and submit to the court a plan of desegregation designed to eliminate the dual system of public higher education in Tennessee. *Ibid.*

In its decision on the merits, the district court agreed "that the dual system of education [in Tennessee] created originally by law has not been effectively dismantled." *Sanders* v. *Ellington, supra,* 288 F. Supp. at 940. The court concluded, however, that the construction of new facilities at UT-N would not perpetuate the dual system of education and thus declined to enjoin this construction.

Id. at 941-942. Instead, the court ordered the parties to submit plans to dismantle the system of segregated higher education in Tennessee, with particular attention to be given to TSU. *Id.* at 942-943.

Plans were eventually submitted pursuant to the court's order and a month-long evidentiary hearing on appropriate relief was held in 1976. On January 31, 1977, the district court entered an opinion stating that it would require UT-N and TSU to be merged by July 1, 1980, as a single institution of higher education under the governance of the State Board of Regents. *Geier* v. *Blanton, supra,* 427 F. Supp. at 660-661.

2. On February 22, 1977, before any judgment was entered by the district court pursuant to its decision, petitioners sought to intervene in the litigation. Petitioners, who are faculty members of UT-N, submitted as an "Offer of Judgment" a document purporting to set out standards to safeguard petitioners' tenure and employment rights during the merger of the two universities.

On February 28, 1977, the district court entered its judgment ordering the merger of UT-N and TSU under plans to be developed by the State Board of Regents.[1] 427 F. Supp. at 661. At the same time, the court denied petitioners' motion to intervene. The court stated that "[a]ny interests the intervening plaintiffs assert in their motion could have been asserted much earlier during the long history of this lawsuit, since merger of the two institutions has been a proposal before this court for several years" (Pet. App. 16).

The court of appeals affirmed. The court concluded that the district court did not abuse its discretion in denying intervention, and noted that petitioners had not

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[1]Some of the state respondents appealed this judgment. Oral argument in the court of appeals was held in October 1978. The case is under submission.

been deprived of their "right and opportunity to protect their interests by other courses of action available to them" (Pet. App. 14).

ARGUMENT

The court of appeals correctly held that the district court did not abuse its discretion in denying petitioners' motion to intervene. The decision in this case is not in conflict with any other decisions and further review by this Court is unwarranted.

Petitioners recognize (Pet. 7-8) that whether a motion for intervention is timely under Rule 24 of the Federal Rules of Civil Procedure (*NAACP* v. *New York*, 413 U.S. 345, 366 (1973); footnotes omitted)

> is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review.

Petitioners contend (Pet. 9), however, that the district court abused its discretion in this case because an "unduly heavy reliance * * * was placed on lapse of time" in determining that intervention was untimely.

Contrary to petitioners' claim, the district court did not "unduly," or exclusively (Pet. 7), rely on the lateness of petitioners' motion in its decision denying intervention. Instead, the district court's decision (Pet. App. 15-17) reflects its thorough consideration of the circumstances relevant to petitioners' motion to intervene. To be sure, the court emphasized the protracted history of the litigation and petitioners' substantial delay in seeking intervention (Pet. App. 16). The court also explained, however, that petitioners would not be prejudiced by the denial of their motion to intervene because they may express their employment concerns to the State Board of Regents under the merger planning process established by the court's order (Pet. App. 17).

The court of appeals fully examined the record and concluded that denial of intervention in the particular context of this case was not an abuse of discretion. There is no reason for this Court to review this essentially factual determination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1979

DOJ-1979-03